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Plea bargaining in Russia: the role of defence attorneys and the problem of asymmetry

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ABSTRACT

This research examines pretrial and trial negotiations in Russia’s criminal justice system. It corroborates the statement that plea bargaining is a norm until it preserves the latter element – “bargaining.” Negotiation skills are especially important for defence attorneys who take a mediator position between the legal community and civil society. The author claims that the nature of negotiations in Russia’s criminal justice system is no different from that of other countries. Institutionally the weakest professional group in the Russian legal field, defence attorneys manage to play on the weaknesses of law enforcers and balance their own bargaining position. Yet, accusatory bias of Russian criminal process, managerial problems in law-enforcement agencies, and ineffective regulation of the appointed counsel system create a fertile ground for “shady” practices of defenders. In legal jargon, this phenomenon is labelled as “pocket defence attorneys” – a concept that embraces those actions of appointed counsels that benefit state officials but not defendants. Dependence of appointed defence attorneys on law enforcers is a top-of-mind problem for Russia. An examination of such extreme cases can shed some light on the extent to which organisational context shapes the way lawyers dispense justice elsewhere.

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Introduction


Scholars provide two different explanations of the nature of negotiations in criminal justice – structural and social. The former derives from the organisational analysis of courts: as other bureaucratic organisations facing certain administrative concerns, courts develop specific administrative answers. Negotiations are one of such solutions or techniques used by court members to reap some benefits, namely reduce caseloads, press weak cases, etc. The organisational structure of criminal justice can be changed in a way that the system of incentives will be reshaped and plea bargaining will be reduced, for instance, by increasing the opportunities for defendants to waive jury trials (Alschuler, 1983), by making plea bargaining less expeditious and hence less favourable (Schulhofer, 1984), or by increasing the prosecutorial screening function (Wright & Miller, 2002).
The social explanation of the nature of negotiations reposes on the idea that communication is an inherent element of any interaction and that *plea bargaining is a norm*. In this sense, whichever changes in organisational structure are implemented, negotiation will remain. Maintaining group cohesion and reducing uncertainty are at the core of any social interaction, and relations between court members are not an exception. Broadly speaking, plea bargaining is a commercial contract, an invisible hand that distributes benefits among market players according to their bargaining skills (Easterbrook, 2013). The problem here is that most negotiations are conducted underground; market transactions are invisible and unregulated. Suggested improvements include making plea bargaining more transparent and available to everyone, so that consumers’ rights receive appropriate protection (Bibas, 2011).

This study rests mostly on the social explanation of the nature of negotiations, while the main arguments of the structural approach are also taken into consideration. Plea bargaining can be regarded as a norm, insofar as all parties have more or less equal power in negotiation and it results in a win–win outcome. Judges, prosecutors, investigators, and defence attorneys all represent one profession and embrace a common way of thinking like a lawyer. This encourages professional collaboration, a phenomenon that is present in any type of professional work. In some cases, however, cooperation between lawyers takes a “pathological” form and no longer relies on professional values. As a result, one party (the defendant) is invariably losing.

Hereafter, I explore the role of negotiations in Russian criminal process, where – unlike in several other countries – plea bargaining is a formalised procedure. First, I describe the theoretical model of courtroom workgroups and negotiations. Then, I analyse how Russian lawyers interact with each other at the pretrial and trial stages and describe the role of defence attorneys in negotiations. (Most studies on plea bargaining concentrate on the trial stage, but in the Russian context, it is highly important to analyse the pretrial stage, since that is when the verdict is de facto given.) Further, I characterise the professional situation of Russian defence attorneys in terms of institutional weakness and dependency and show how this leads to asymmetry and “pocket” practices – a problem occurring when “breaches” of adversariality emerge and when defence attorneys no longer protect the interests of their defendants. Finally, I present my own view on the relation between adversariality as a doctrinal position and plea bargaining as an objective reality.

**Theoretical model: courtroom workgroups and the role of negotiations**

**Courtroom workgroups and its goals**

In their seminal work, Eisenstein and Jacob (1977) introduced the analytical concept of “courtroom workgroup,” which suitably addresses the character of interactions between court members. Further, I emphasise the key findings of the book.

First, Eisenstein and Jacob (1977) assert that defendants are sentenced not in a vacuum but in a certain social context: “Outcomes of the felony disposition process are not the result of singular efforts by judges, prosecutors, or defence counsel. Outcomes result from interactions among these courtroom members” (p. 294). Even if those actors serve different organisations, play different roles, pursue different tasks, and acquire different resources, they all work for the same *external goals* – doing justice and handling cases expeditiously. Despite the fact that the meanings of “doing justice” and the reasons for expeditious disposition may vary a lot for different members, shared obligations make court members dependent on each other and encourage them to develop *internal* goals of interaction, which are maintaining group cohesion and reducing uncertainty. Thus, the outcome of the case for the defendant greatly depends on stability of relations between courtroom members and on the established rules of interaction.

Second, the essential purpose of interaction is to find a *common ground on the case*, this is why information becomes the vital resource, and negotiating the primary technique of
workgroup members. (The two other work techniques of court organisations, about which Eisenstein and Jacob do not discuss much, are unilateral decisions and adversarial proceedings.) Negotiations are an art of information manipulation: the prosecution normally knows more about the facts of crime, and the defence has more information on the characteristics of the defendant and the practice of handling similar cases in other courts. Both kinds of information are important with regard to the final judgment. Plea bargaining is only one use of negotiation; the various other legal aspects of the case and the practices of handling similar cases in other courts are also negotiated. In the course of negotiations, Eisenstein and Jacob propose, “both parties are likely to move from their original positions towards a mutually acceptable outcome” (Eisenstein & Jacob, 1977, p. 32).

Third, Eisenstein and Jacob present the system of justice as a local phenomenon. Just as if they were testing the proverb “Different strokes for different folks,” they compare the way a same crime has been investigated and disposed in three different cities and three different organisational contexts – Baltimore, Chicago, and Detroit. Despite the fact that statistically conviction rates are identical everywhere, the way of doing justice is quite different, in terms of expediency of proceedings, disposition methods, proportion of bails, guilty pleas, dismissals, etc. Such discrepancies derive from the policies implemented by sponsoring organisations (courthouses, district attorney offices, bars), as well as from the role of media, civil society, political culture, and other factors of macro-environment. For example, differences in the rotation system create stable workgroups with high rates of plea bargaining in Chicago and, on the contrary, lead to lesser degree of familiarity and higher number of trials in Baltimore.

Fourth, Eisenstein and Jacob show that workgroups do not exacerbate injustice and inequality based on race and wealth. Regardless of the intensity of daily interaction between the court members in different cities, all defendants get similar verdicts for similar crimes. Authors suggest that, instead of searching for racial or economic biases, the question that should be asked is: How often do courts convict innocent defendants and why does this happen? Two of the possible problems that Eisenstein and Jacob indicate are associated with police perjury (we do not know how often policemen lie in court) and ineffective representation (we do know how often defendants plead guilty to a crime they did not commit). The authors do not go into details on how to improve the system of criminal justice but assert that any reform proposals should be first of all estimated in terms of their effect on workgroups. Structural solutions without social reasoning will not succeed due to adaptiveness among the courtroom organisations.

Eisenstein and Jacob’s book (1977) offers a splendid analysis of micro-politics of criminal courts through the macro-context and extends our understanding of how justice systems work on the level of individuals’ interaction. Both authors are political scientists and therefore perceive courtroom members mostly as parties lobbying their interests. Authors do not dwell on what exactly negotiations are. Also, they do not reveal advantages and disadvantages of the criminal justice model in each of the three cities. As a result, readers cannot say if negotiations are good or bad, nor if we should abolish or take them for granted. Prior to discussing if negotiations are a threat or an alternative to adversarial proceedings, it is important to clarify what we call “negotiations.”

**What are negotiations?**

Plea bargaining studies is to a great extent a policy-oriented field of research. This leads the scholarship to focus on the result rather than the process: researchers are concerned more with the effects of plea bargaining on the outcome than with how negotiations really occur. The proof of such state of affairs is the wide range of different typologies of plea bargaining. Scholars assure us that plea bargaining can be explicit or implicit (Schulhofer, 1984); initiated by a judge, a prosecutor, or a defence attorney (Padgett, 1985); that it happens more often with particular kinds of crimes (i.e., less severe) and correlates to the judges’ working experience (i.e., the more
experienced the judge, the more prone s/he is to negotiate) (Abrams, 2011). Yet, nature of negotiations remains unclear; so what are negotiations as a process?

To start with, plea bargaining and negotiations are often used as synonyms. The concept of “plea bargaining” is typically applied as a generic term for all kinds of negotiations in criminal process – on charge, on type of process, on characteristics of defendants, on length of incarceration, etc. (Feeley, 1979; Maynard, 1984). Even though admission of guilt is the most decisive resource and the most desired goal of negotiations, not all bargains aim at achieving guilty plea.

In his book Inside Plea Bargaining (1984), Douglas Maynard made a very detailed and comprehensive analysis of negotiations from a “within perspective.” He describes negotiations as an everyday practice of courtroom members, “an inside activity (…) carried on by professionals in bureaucratic manner” (p. 201). All lawyers work with legal facts. Negotiations are aimed at examining all legal facts that both parties consider valuable, which also involves making a decision on the suitability of the case and coming to a resolution on what to do further. As Maynard points out (1984), negotiations are “not so much an information exchange system nor a mechanism for reaching agreements about facts and character” as they are “a vehicle for assuming numerous kinds of postures that sustain the viability of a given case action” (p. 134). If during negotiations a defence attorney could make the case unviable, then a prosecutor should drop it before the trial, even if s/he is convinced of the guilt of the person.

Negotiations are not any kind of cooperative communication. They have a distinctive linguistic form: the bargaining sequence, the author argues, necessarily includes an opener and a reply. There are two types of openers: offers (“OK, there is an offer”) and position-reposts (“I want you to dismiss it”). Replying to the opener parties can come to the three following resolution opportunities: (a) unilateral agreement (one party accepts a proposed offer/position of the other), (b) bilateral agreement (one party rejects an offer/position and makes a counter-proposal which is accepted by the other), (c) compromise (both parties come to an intermediate position). The ultimate purpose of negotiations for a lawyer is to find a common ground, to get one’s arguments across, and eventually to construct a “viable” case.

Negotiations can proceed in a more or less adversarial discourse. In some cases, negotiation is a perfunctory discussion about procedures that goes very smoothly; in others, it is an exchange of controversial arguments about the moral character of the defendant and her/his prior records, which takes the form of adversarial conflict. Either way, negotiation is based on collaboration and mutuality. Lawyers use information contextually; they manipulate it according to their practical concerns. A defence attorney makes some characteristics of the defendant visible and leaves others neglected; the same is true for other participants. Ultimately, both parties bring to each other’s attention all valuable information about the case – advantageous and disadvantageous. Even if they disagree about facts, they keep communicating and taking into account each other’s arguments in order to achieve a mutually satisfactory outcome. In this precise, professional sense, defence attorneys, prosecutors, investigators, and judges are the members of workgroups: they all work on the construction of collective product that is a legal case.

**Defence attorneys as effective negotiators**

It is helpful to conceive workgroup as an analytical tool that encompasses different collaborative practices of repeated players, rather than as assemblies of people who conduct some sort of covert activities. The character of interactions within the workgroup depends to a large extent on the behaviour of the defence attorneys, who have less organisational pressure and whose range of action is much wider than that of judges and prosecutors.

Defence attorneys play a key role in workgroups since they act as mediators between state officials and civil society. On the one hand, defence attorneys work for clients, and the delivery of high-quality services today will guarantee their occupation tomorrow. On the other hand, defence attorneys work in everyday contact with other members of legal profession, with whom they aim
at cultivating long-term relations. Blumberg (1967) referred to such institutional position as that of a “double-agent.” This model has negative connotations as it portrays defence attorneys as fellows of the court, for whom defending client’s interests is of secondary importance to being in good terms with judges and prosecutors. Such view is not convincing. Cooperation does not mean backdown or collusion: it is beneficial for defence attorneys just as it is beneficial for clients (Lichtenstein, 1984). At the same time, the alternative representation of defence attorneys as justice crusaders who alone oppose the system is also misleading.

**Effective negotiator** is another ideal model of professional role of defence attorneys that seems to be a compromise between attorneys as double agents and zealous crusaders. As Uphoff (1995) argues, an effective defence attorney is one who obtains all possible information about the defendant, formulates a negotiating strategy that is appropriate to the given situation, and gets the optimum result for the client through bargaining. Defence attorneys spend much of their time bargaining; their competence as negotiators includes the understanding of formal and informal incentives of the other participants. They can figure out when to negotiate, which offers to take and which ones to reject, when it is suitable to make counter-proposals, and what style of negotiations to use in a particular context. Simply put, they know how to have the best of a bargain. In order to change the prosecutor’s initial disposition, defence attorneys underscore the legal and practical weaknesses in the prosecution’s case and point out mitigating circumstances for the defendant’s actions (Lynch, 2003, p. 1403).

A consulting profession, lawyering rests not only on acquiring expert knowledge of law but also on communication skills. The mediatory position of defence attorneys determines their two main areas of work: (a) socialising clients into the legal system, shaping their view on legal order, interpreting the actions of state officials; (b) transforming citizens’ needs into legal categories, constructing the legal case, and presenting it to other lawyers. In sum, it is centred upon translation from everyday language to the language of law, and vice versa.

Clients usually think that the system of justice is predictable, impartial, and inerrable (Sarat & Felstiner, 1986). Defence attorneys dispel all these illusions by showing that the job of judges is hurried and routinised, that their mind is unfathomable, that the outcome of the case is unpredictable and depends on personal connections of the defence attorneys with state officials. To earn the confidence of the client, defence attorneys should promote themselves not only as experts in law but also as possessors of insider knowledge on how the system works. Socialisation of clients also benefits state lawyers: first, citizens with unfounded claims will not run to the courts since defence attorneys will filter them out; second, socialised and informed citizens know what to expect and have a realistic level of expectations.

Two concluding remarks are in order at this point. First, the work of lawyers is interwoven with negotiations, as these are an intrinsic property of any legal practice. Second, negotiations are cooperative and competitive at the same time. Having control over different kinds of information “makes the ‘game’ of plea bargaining a gamble for both sides” (Caldwell, 2012, p. 70). In other words, there is nothing wrong with plea bargaining, until there is “bargaining.”

**Evidence from Russia: pretrial and trial workgroups and the role of defence attorneys**

**Empirical data**

The current study of workgroups in Russian criminal justice is a part of a bigger project on Russian advocates conducted by the Institute for the Rule of Law (IRL). The project has started with the following research question: What is the professional situation and institutional position of Russian defence attorney’s vis-à-vis law enforcers and judges? Given the accusatory bias in Russia’s system and the major role of state officials in handling criminal cases, Russian defence attorneys are often seen as the weakest players of the legal field, not having real
power. In the course of interviewing Russian advocates, our research team found that this viewpoint is true only to some extent. For instance, subordinated position of defence attorneys to their counterpart can be perceived both as evidence of institutional dependency (more so for appointed counsels) and as a tactic that benefits a client (more so for hired counsels). Although less than 1% of court cases in Russia end in acquittal,3 there are various ways to quasi-acquit a defendant; in such situations, the work of defence attorneys is of utmost importance. The current paper discusses the bargaining opportunities of Russian defence attorneys in the context of accusatory bias, and the modes of their cooperation with state lawyers.

The empirical database of the research consists of 54 semi-structured interviews with Russian advocates and 115 h of observations of criminal trials in district courts of St. Petersburg (see Table 1). Two-thirds of the interviews were taken in St. Petersburg and the rest in Moscow, Vladimir, Kazan, and Irkutsk. The majority of the informants were specialising in criminal cases; almost all of them had experience of working as appointed counsels, although only few of them were doing this job on a regular basis.

Observations in criminal courts became the logical extension of the project.4 From 2014 to 2015, I observed more than 50 criminal cases (under 28 articles of the Criminal Code, with 29 judges, and in 9 district courts of St. Petersburg) focusing on how judges, public prosecutors, and defence attorneys handle criminal cases. Data from observation were recorded in a structured diary. General characteristics of the case; description of physical space; timing; type of procedure; actions and direct orations of different actors; patterns of interactions before, during, and after the hearing were tracked for every case. An increasing focus was on the difference between the work of appointed and hired counsels, as well as on the informal culture of the courts. To conduct the same observation at pretrial stage was literally impossible since police offices are completely closed to strangers. To describe the law enforcers’ context of work and the role of negotiations at pretrial stage, a separate database was analysed (see Table 2). This includes more than 100 interviews with judges, prosecutors, investigators, and policemen, which were collected by the IRL from 2010 to 2013 within the frameworks of different research projects.5

### Table 1. Interviews with advocates.

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<tr>
<td>Total number of interviews</td>
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<tr>
<td>Individual</td>
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<tr>
<td>Group</td>
<td>3</td>
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<tr>
<td>Total number of informants</td>
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</tr>
<tr>
<td>Male</td>
<td>48</td>
</tr>
<tr>
<td>St. Petersburg</td>
<td>35</td>
</tr>
<tr>
<td>Specialisation on criminal cases</td>
<td>44</td>
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</tbody>
</table>

### Table 2. Interviews with law enforcers and judges.

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<td>Total</td>
<td>110</td>
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<td>Judges</td>
<td>19</td>
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<tr>
<td>Chiefs of the court</td>
<td>16</td>
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<tr>
<td>Prosecutors</td>
<td>11</td>
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<tr>
<td>Investigators</td>
<td>43</td>
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<td>Police officers</td>
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<td>Heads of police offices</td>
<td>7</td>
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</table>

Professional situation of Russian advocates

Throughout history, Russian advocates6 were facing a wide range of problems typical of the phenomenon of professionalisation from above: ambivalent relations with the state, low prestige, lack of collective action, autocratic culture and inefficiency of professional associations. Advocates
were mentioned as a professional group for the first time in the course of Alexander II’s Judiciary Reform of 1864. Due to the high qualification standards for entering the profession, prerevolutionary advocates were small in numbers, but wealthy and respected. From the very beginning, the relations between the advocates and the state were ambivalent. On the one hand, self-regulation institutions of prerevolutionary advocates made them not much different from their Western colleagues (Mrowczynski, 2012). On the other hand, the limits of the professional autonomy were determined by the state’s interests. The rather ambitious judicial reform of XIX century had been shortly thereafter rolling back: in 1874, the power to exercise disciplinary actions was handed back from the bars to the judicial authorities; in 1889, the government banned the formation of new local bars; in the meanwhile, pan-Russian congress had been held only once. Thus, autonomy de jure was not translated into de facto autonomy. As Levin-Stankevich (1996) notes, the state has always reminded advocates that being member of a free profession does not mean being a free professional (p. 237). Additional problems of prerevolutionary advocates were related to low reputation and lack of professional solidarity. As for the former, prerevolutionary advocates earned much public recognition by defending persons charged with political crimes in the end of XIX century (Barry & Harold, 1968). As for the latter, absence of national association and paternalistic guardianship of the local bars restrained natural mobilisation of professional community (Burbank, 1995).

In Soviet times, the judicial system underwent radical changes. The new government carried out a collectivist project of advokatura: the private practice and the market of legal services were abolished, and the advocates had been attached to state legal bureaus. The new role of the Soviet advocate was that of assistant of the court who helps judges and prosecutors to establish the objective truth (Undrevich, 1928). The Ministry of Justice controlled the policy of local bars and the elections of its presidium. Yet, advocates had not become part of the state hierarchy and still enjoyed a degree of autonomy that any other professional group in the USSR could only dream of (Huskey, 1982). For a long time, advocates were perceived in a negative light as representatives of bourgeois society and protectors of enemies of the people. But – just like a century before – they managed to recover their reputation by defending the Soviet dissidents in the 1970–1980s.

A new stage of professional project of Russian advokatura started after the collapse of the Soviet Union. The emergence of a market economy created new job vacancies in the legal sphere, which were filled mostly by former business counsels (jurisconsults) and younger lawyers. In the 1990s, Russian advocates were placed in an emerging context of market economy and faced the same problems as their Western colleagues – marketability of services and professional monopoly. Soviet advocates held exclusive monopoly on representation of individual clients in all cases at all stages. But as of the late 1980s, the situation was changing: advocates started losing their monopoly both to alternative bars and new law firms, which were taking incumbent positions on the market of legal services.

Only in 2002, a Federal Law on advokatura regulating the profession passed. As Burrage predicted (1993), the advokatura was “swamped by a host of wholly unregulated practitioners” (p. 585). The old bars’ leadership had no capacity to mobilise the profession. The main discussion over the draft of the Law “has been less about building the advokatura as a self-governing legal profession in the Western sense and more about maintaining a legal institution whose main function is to provide legal aid to Russian citizens” (Jordan, 2005, p. 775). Obligation to provide indigent citizens with a free legal aid gave the state a cover for active involvement in decision of how the professional community should be organised. As a result, the only monopoly that advocates had retained was representation in criminal cases – their exclusive privilege and duty for the last 150 years. Advocates continue facing the exact same problems as before: low reputation, paternalism of the state, and lack of solidarity. Today, in civil cases, anybody (i.e., even one lacking a law degree) can work as a representative. Those legal representatives who do not specialise in criminal process often perceive an advocate licence as a burden rather than a privilege due to difficult qualification exam, higher taxes, ban on advertising, and ill reputation of
appointed counsels that shed negative light on all professional community. Moreover, even though the control of the Party has vanished more than 20 years ago, advocates continue experiencing the pressure from the state, especially in criminal cases.

Further in this article, I will focus solely on criminal process; I will thus use the term defence attorneys when referring to advocates working on criminal cases. The following aspects are important for understanding the current position of Russian defence attorneys: (1) every citizen who is subject to criminal liability is provided with a free representative on pretrial and trial stages; (2) if citizens do not wish to use services of an appointed representative, they can hire another one and pay her/him out of pocket; (3) only lawyers who are licenced as advocates can be representatives (both appointed and hired) in criminal cases; (4) the work of appointed advocates is remunerated by the state and coordinated by the local bars. “Appointed counsel” and “hired counsel” in reality are two types of contracts that serve different goals. Some defence attorneys work only by appointment, others only by agreement with a client, but most of them conclude both types of contracts.

The common view on the professional situation of Russian defence attorneys throughout the history is that they are the weakest professional group in the legal field. As Rand (1991) puts it, advocates were always in a separate, minor league. Nowadays, Russian advocates are still subject to domination by law enforcers and their institutional incentives. Russia’s system of law enforcement borrowed much from the Soviet times. The most important path-dependence effects relevant to the current situation of defence attorneys are (a) accusatory bias in the criminal process and (b) evaluation system of policemen, investigators, and prosecutors.

As for the latter, the efficiency of law enforcers is estimated through formal indicators established by the higher authorities, namely the number of registered, detected, and prevented crimes (also in comparison with the previous period). This has been informally called “checkmark system” (palochnaya sistema) (Paneyakh & Titaev, 2011). A reflection of the Soviet planned economy, a checkmark system shifts the focus of police work from crime detection to plan fulfilment. Trying to match statistics, law enforcers become very skilled in selecting which reports should be registered as crimes, in wrongful qualification of criminal actions, and even in falsification of crime rates (Paneyakh, 2013; Shklyaruk & Skougarevsky, 2015).

Accusatory bias derives from the inquisitive nature of the Soviet system of justice (Solomon, 2015). Russian law enforcers and judges are compelled to produce only guilty verdicts since every acquittal draws special attention from the higher authorities and potentially bears career risks for everyone involved in the case (Paneyakh, Titaev, Volkov, & Primakov, 2010; Pozdnyakov, 2015). There is even such a Soviet legacy as “reinvestigation” when a case that has a chance to end up with acquittal in court is returned at the pretrial stage to be reinvestigated but instead is getting dismissed right after.

The easiest way to get a guilty verdict in courts is to have an admission of guilt during the investigation process. In Russia, admission of guilt is a formal procedure, which is embodied in two institutions. The first one is the so-called special procedure court hearings (osobyi poryadok), which means a fast-track litigation without examination of evidence. It applies only to crimes with the maximum prison term (up to 10 years) and guarantees reduction of the term by one-third in exchange for plea guilty. The second institution is “pretrial settlement,” which is usually associated with more serious crimes. It includes not only an admission of guilt but also the defendant’s repentance and collaboration for crime detection. In exchange, the defendant gets a milder sentence.

Russian investigators seldom use pretrial settlement, while special procedure is applied in more than 60% of all criminal cases (according to the statistical data of Justice Department of Russian Federation). Some researchers (like Bibas, 2011) suggest that plea bargaining resembles transactions in the illegal markets, where the state does not control the terms of the contract or the quality of services and does not protect consumers’ rights. From this point of view, “legalisation” of plea bargaining, by making it more transparent and formal a procedure, will benefit everyone,
especially defendants. Interestingly, Russia’s case proves the opposite: formalised contract of plea bargaining helps mostly judges and law enforcers. Even though the procedure of pleading guilty is formalised, the practice of its implementation is often flawed. Introduced in 2001, the legislation on special procedure aimed at fastening the proceedings of "simple" crimes. In fact, it reduced by much the average duration of criminal procedure and increased court efficiency but, as Solomon (2012) notes, did not make judicial process more transparent and less inquisitorial as expected. In a context of accusatory bias, special procedure became a powerful weapon in the hands of state officials. A sentence delivered through special procedure cannot be appealed: this cuts potential risks for investigators and therefore induces them to abuse it. As Paneyakh (2013) says, legal professionals in Russia select the “easiest cases to process rather than serve larger goals of justice and equality” (p. 2). I do not infer here that contracted plea bargaining is not acceptable by default. For example, in Italy, it works proficiently: it does not undermine the adversariality of the process, and the accused sometimes do very well (Solomon, 2012). In Russia, however, it became yet another bureaucratic instrument that at the end of the day does not provide defendants with a better outcome.  

This brief introduction to some crucial aspects of the rule of law in Russia gives a general idea of the working environment of Russian defence attorneys. What defenders can obtain for their clients is determined by the interests of the state officials with whom they must deal (Solomon, 1987). Policemen, investigators, prosecutors, and judges are all accountable to the state and bound by a united system of institutional stimuli: one acquittal can simultaneously lead to reprimand of a judge and to the retirement of an investigator. Accusatory bias and the system of evaluation create demand for predictable and loyal defence attorneys who do not cause any delays or other problems. At the same time, defence attorneys are well informed about the working environment of law enforcement agencies and understand their institutional logic. (Some of them have worked there before.) Hereafter, I show how defence attorneys adapt to the given professional situation and even manage to reap benefits from it.

**Russian defence attorneys as members of workgroups**

Criminal defence in Russia is weaker than investigation and prosecution in many respects. Besides the positional disadvantages described above, the recourses of defence attorneys are also scarce. Historically, Russian advocates had a restricted access to defendants and case files at the pretrial stage. In the Soviet period, there were particular types of cases, on which only few privileged advocates could work (Kaminskaya, 1982). Access to cases (dopusk) allowed law enforcers to obtain informal control over defence counsels and was perceived by the latter as the most sensitive threat to their professional autonomy.

Contemporary advocates also experience difficulties at the preliminary investigation stage. The work conditions of defence attorneys and law enforcers are by no means equal (Khodzhaeva & Rabovski, 2016; Kramer, 2003; Pomorski, 2007). Russian defence attorneys are not able to conduct their own investigation. If they get the evidence, they have troubles to attach it to a case, since investigators are those who evaluate the evidence in terms of relevance, admissibility, and creditability; in practice, they reject most of the advocates’ motions. If evidence, nonetheless, was attached, at the trial stage, judges tend to give more credit to the proofs collected by investigation than by defence. Moreover, if defence attorneys signed an official pretrial settlement on collaboration with prosecution, judges are not obliged to follow the terms of the agreement and can adjust or cancel it at their own discretion. Also, during court hearings, the motions of the defence are more often declined than those of the prosecution. Consequently, defence counsels must make their best efforts to attain something that state agents get on a silver platter.

Russia is not an exception in this case. The problem of institutional weakness of defence attorneys exists in many other countries. Defence attorneys often have to work on another’s territory - courts, police offices - and thus their initial position if often disadvantaged. In the
United States, public defenders also face insufficient institutional support by comparison with prosecutors (Blumberg, 1967; Bright, 1994; Uphoff, 1995) who tend to abuse their power and often overcharge the defendants in order to initiate “coercive plea bargaining” (Caldwell, 2012).

The organisational structure of criminal process generally places defence attorneys at disadvantaged position, but this does not lead directly to unfair treatment for defendants. Positional weakness does not translate into negotiating weakness. Since Russian investigators send to courts only those cases that have good chances to win, and verdict is de facto taken at the pretrial stage (Titaev & Shklyaruk, 2016), it is extremely important for defence attorneys to play well their cards before court hearings. Falling into investigator’s trap of institutional incentives, Russian defence attorneys resort to the “weapons of the weak” (Khodzhaeva & Rabovski, 2016) or, as one defence attorney puts it, they “speculate on the problems of investigation.” Defence attorneys use a variety of tactics that block investigators’ work and turn accusatory bias against them. Namely, they search for procedural errors and misspellings in the documents that could lead to an acquittal in court; they control timing, which is essential for investigators and prosecutors; they bring independent experts; they teach witnesses how to pass through interrogation; etc. In the end, they manage to find ground for negotiations on equal terms.

In the theoretical part, I described negotiations as a professional way of doing justice: everyone is willing to cooperate since this reduces uncertainty and saves time. Interviews with Russian defence attorneys and observations in criminal courts confirmed that negotiations are an essential element of lawyering that occurs as a part of everyday discourse. Due to accusatory bias, the most important negotiations – on charge and sentence – usually happen before court hearings. The sooner a defence attorney enters a case, the more chances s/he has to get a fair treatment for the client. If pretrial negotiations with investigators are not successful, defence attorneys still have a chance to prove their position in court.

Maynard (1984) discerns two main layers of negotiations, which we also find in Russian criminal process. The upper layer is based on factual information. Admission of guilt and special procedure are at the centre of attention here. If the accused pleads guilty, the investigator promises him/her a milder sentence or withdrawal of some charges. People are usually prone to settle since they face the potential loss of years of freedom. The role of defence attorneys as mediators is very important here: (a) if the evidence does not support the charges, they should dissuade their clients from the admission of guilt; (b) if the evidence is exhaustive, they should use the admission of guilt as a resource in negotiation and gain maximum benefits out of it.

Russian defence attorneys understand that special procedure is not always a good deal for the accused. Therefore, those counsels, who refuse to work by appointment and represent white-collar clients, rarely agree to use it. One of our informants of that kind referred to special procedure as the way to “condemn yourself.” Defence attorneys working with low-status clients, on the other hand, are more lenient to special procedure. The truth is that – as all lawyers like to say – circumstances alter cases. Below is a typical example of beneficial use of plea guilty.

This is a normal plea bargaining. (...). We have a road traffic accident with deaths. If it’s the defendant’s first charge, then he will get a suspended sentence and a revocation of his driver’s license. If parties negotiate – you give a suspended sentence and do not revoke the driving license, we plea guilty – the deal is done. The defendant keeps the license and continues driving. (defence attorney, Irkutsk, 522)

The lower layer of negotiations is built around the characteristics of a defendant; such bargain occurs when there is already a plea of guilty, mostly at the trial stage. During negotiations lawyers create a criminal self of the defendant (Sarat & Felstiner, 1986). For every case, there is a unique set of attributes of the defendant (prior records, marital status, employment, race, belonging to ethnic minorities, mental state, etc.) and circumstances of a committed crime. A defence attorney should bring the attributes that are relevant for the concrete case to the attention of the judge and the public prosecutor. Thus, the defence attorney’s job is to look for uniqueness in every case, which will allow the judge to use her/his discretion and soften the sentence. As Luban (2001)
describes it, using facts selectively to support favoured conclusions is what advocates do for a living, it is their occupation (p. 171).

I said, “Imagine her [defendant] situation. She has two kids. If she gets a suspended sentence, the Child Protection Services will have a file on her. (…). But she is a good woman”. And then the public prosecutor replied, “Let’s dismiss the case”. The judge was also supportive, because all work on the case was done well, all characteristics were collected. (…). My task was just to depict the situation in a favorable light. (…). The judge is also human, she sees what is happening, and meets the needs. So, we changed qualification and signed a peace treaty. What was impossible to do at pre-trial stage, we reached in court. (defence attorney, St. Petersburg, 10)

The choice of the type of procedure is a focal point and a key bargaining tool in both layers of negotiations. During pretrial negotiations, both parties can “threaten” each other with trials. Russian defence attorneys could say that if the case goes to trial, it will end up with acquittal, since a judge can see the case differently. In interviews, all defence attorneys were very excited to tell stories about their bargaining victories through such lever. For a Russian advocate, who most likely will have an acquittal only once or twice in his/her entire career, the more realistic definition of “victory” would be a dismissal at the pretrial stage.

I managed to dismiss a case before the court hearings. I persuaded an investigator that (…) if he sends this case to trial, he is going to get an acquittal. (defence attorney, St. Petersburg, 13)

Besides the two aforementioned main layers of negotiations, there are numerous other forms of routine negotiations, which are often associated with timing. Some themes of such negotiations are, for instance, how to choose a date for the trial that works for everyone; how to conduct an examination without dragging the trial out too long, i.e., which questions should be asked and which can be skipped, which witnesses should and should not be interrogated, etc. These kinds of negotiations usually happen in the aisles of the courthouses before the trial or in the courtrooms while waiting for a convoy.

There are situations when a police escort is late (…) and it happens that the judge, the defense attorney, the public prosecutor, and the secretary are sitting altogether in the courtroom. And they informally discuss different issues, such as what will be inquired, what the public prosecutor can drop, and how the judge sees the case. (defence attorney, St. Petersburg, 11)

Thus, negotiating is a natural process in Russian criminal process. As Maynard (1984) puts it, “bargaining talk is distributed systematically within work routines which relate prosecutors, defence attorneys, and judges to a series of activities occurring both before and after any episode of negotiation” (p. 140). This is why participants do not even perceive it in terms of cooperation but rather as “a working environment, whose goal is to save time and nerves of each other” (defence attorney, St. Petersburg, 34). Everyone is interested in having a cooperative counterparty and creating relations that are built on trust and creditability. Confrontation can be beneficial only in particular and rare situations.

To work with a competent defense attorney is a big pleasure because you can always negotiate with him. (prosecutor, St. Petersburg)

For me building trust with a counterparty – an investigator, in this case – is a necessary and inevitable condition. I must look for mutual trust because otherwise I will not start a dialog with him. I will not be able to get my position over to him. (defence attorney, St. Petersburg, 10)

Both parties are professional lawyers working on the construction of “viable” criminal cases. In order to do so, they should have all information related to the case to test the survivability of their own version. After all, even disagreement rests on the consideration of what the opponent has to say. One of the informants compared it to playing chess, “You play white, I play black. One of us wins but it doesn’t mean that we cannot be friends” (defence attorney, St. Petersburg, 51). This quote is a good illustration of the nature of negotiations – they are cooperative and competitive at the same time. At the end of the day, lawyers play together the game of doing justice.
To the problem of asymmetry

Counsel from the pocket: who is it?

Negotiations rest on the idea of cooperation and competition. Defence attorneys play the role of counterbalance to state prosecution: they protect people’s rights to liberty as zealously as law enforcers protect the state’s right on legitimate use of violence. The problem of asymmetry arises when defence attorneys do not act as effective negotiators, when the interests of a defendant are being neglected, and when cooperation with prosecution takes a pathological form.

For Russia, inefficient representation is one of the most serious problems in criminal justice system. There is even a special expression in lawyers’ jargon – *pocket defence attorneys* – which refers to non-professional behaviour of appointed counsels working in the interests of investigation and prosecution. Other epithets of the same phenomenon are “parasitising defence attorneys,” “behind-the-closet defence attorneys,” “on duty defence attorneys,” and “corridor defence attorneys.” In the 3rd International Legal Forum, Russian Deputy Minister of Justice Elena Borisenko used the word “inquisitive defence attorneys,” pointing out that they are a by-product of the accusatory bias.

The following example from the observation in district courts of St. Petersburg illustrates the issue. A defendant was a young migrant from an ex-Soviet republic of Central Asia who was indicted for armed robbery. He admitted guilt at the pretrial stage but during court hearings retracted his testimony. The judge and the public prosecutor were purposely asking him suggestive questions (which is forbidden by law), while the defence attorney did not protest and even helped them.

**Judge:** Did you hold the knife close to the guard’s neck?

**Defendant:** No, I just held it in my hand.

**Judge:** But could it be that it was also close to the neck?

The defendant denies. The judge and the defense attorney reformulate the question several times. In the end, the judge says, “But you already admitted guilt”. Finally, the defendant confirms his previous testimony, and the interrogation continues.

**Judge:** Were you going to spend the money?

**Defendant:** No, I did not even see it.

**Judge:** But did you talk with your friend about it? Did you discuss how much money would you get?

**Defendant:** No, I did not even know where I was going.

**Judge:** But if he had shared money with you, would you spend it?

The defendant confirms, and interrogation continues.

**Judge:** Did you see that people were scared?

**Defendant:** I do not know. It was far from me.

**Judge:** But if someone threatened you with a gun, would you be scared?

The defendant confirms, and interrogation continues. (2014, St. Petersburg, No. 14)

What does being “pocket” exactly mean? The definition is quite nebulous. Actors of Russian legal field relate it simultaneously to three different concepts: (a) a separate group of appointed defence attorneys who collude with law enforcers and judges, (b) particular “pocket” practices of appointed defence attorneys, (c) the whole system of free legal aid, where every defence attorney becomes “pocket” by default. In order to explain what being a “pocket” defence attorney means, it is useful to look at how this term is applied in concrete situations.

Analysis of interviews and disciplinary actions held by the bar shows that the following actions of criminal defenders are typically described as “pocket”:

- affixing a signature on the protocols of the investigators without actual participation in investigative actions;
- passivity in situations when active measures are demanded (lawful arrest and detention of clients, indictment of severe crime without evidence, tortures, etc.);
- taking a position that contradicts the client’s view (e.g., forcing the accused to plead guilty against his/her will);
- collusion with investigators and prosecutors; intimidating clients and inducing them to bribe law enforcers in order to get a better outcome;
- getting cases directly from fellow investigators or judges, i.e., bypassing the bar’s appointment system;
- unethical behaviour, impertinence in relations with clients.

So, “pocket” behaviour is normally described through denial, i.e., what appointed defence attorneys are not doing (even if they should). The only action that a “pocket” counsel does is convincing the accused to plead guilty.

This is a radically different category of defense attorneys. I consider them as parasitizing defense attorneys who go with the current. (…). They do not appeal, do not file motions. (…). Is this defense? (…). They are indifferent people who do not care about people’s lives. (defence attorney, St. Petersburg, 42)

I just had a situation when the defense attorney forced his client to admit committing a very serious crime, and made him sign a pretrial settlement. He promised him a reduction of charges. The defendant – upon the suggestion of the investigator and with the approval of his defense attorney – even signed a few blank forms. (defence attorney, Moscow, 39)

Many legal experts – including defence attorneys themselves – look at the problem of pocket counsels very simplistically picturing them as an organised group of people who are fed by investigators and judges. This is not accurate. Even if there are defence attorneys who receive 80% of their cases from fellow investigators, they get the remaining 20% through own social networks and serve them very zealously. The phenomenon of “pocket” defence attorneys refers more to practices than to people. There are defence attorneys who have never been “pocket,” and there are some who performed that role many times. If the defence attorney has majority of appointed cases, it does not make him/her immediately “pocket.”

A more comprehensive view on the problem of “pocket” defence attorneys would be to perceive “pocketness” as a stigma that is produced through the discourse of professionals, who try to separate themselves from non-professionals. This is thus a distinguishing category that defines what is professionally appropriate and what is not in a given particular role. In our case, it applies to a role of appointed defence attorney. There is no universal definition of professionalism.

The analysis of interviews with Russian advocates shows that the notion of professionalism in the work of appointed defence attorneys differs from that of hired counsels. Appointed attorneys deal with specific forms of criminal deviation: 80% of Russian criminals have a marginal social status (Volkov, 2014); 30% of them are repeat offenders; most common crimes are related to theft, drugs, and beating (see Table 4, 6; Volkov et al., 2014). The wages in the appointment system are very low. Thus, appointed defence attorneys do not usually empathise with their clients and have no incentive to wholly devote themselves to the case.

When you are hired, you will do more for your client. (…). You will file more motions, meet more people. It is probably in human nature: when you have a good salary, you work better. (defence attorney, Moscow, 52)

No one expects extraordinary activity and eagerness from an appointed counsel – adequate minimum of rights protection is enough. This is what Caldwell (2012) refers to as “capable defence” in contrast to “zealous defence.” Yet, if an appointed defence attorney is sure of the innocence of the client, s/he will switch to the role of zealous defender and confront law enforcers by “trying to destroy the case by all available means that are not prohibited by law” (defence attorney, St. Petersburg, 31). The discourse of “pocket” practices of appointed defence attorneys and the problem of asymmetry emerge when minimum rights protection is not granted, innocent
defendants plead guilty, or guilty persons get sentences disproportionate to their crimes. This is why we should look at the problem not from the perspective of the individual but from that of the system.  

**Grounds for collusive behaviour of appointed defence attorneys**

Several factors create conditions for “pocket” behaviour of appointed defence attorneys. First, heavy caseloads and pressures coming from *accusatory bias* make state officials concerned with efficient time allocation. Law enforcers and judges have much paperwork and other routine activities that should be done expeditiously and with minimal costs. (For judges, it can be delivery decisions on detention orders and hearing fast-track cases.) This creates demand for loyal defence attorneys who easily accommodate to the working routine of law enforcers and judges and do not create unwanted problems.

Second, appointed defence attorneys are not only institutionally weak in comparison with law enforcers (as described above), but also financially dependent on them. If an advocate works by appointment, s/he is paid only after an investigator (or a judge) signs the papers and confirms the number of investigative actions (or court hearings), in which the advocate participated. Since state officials have control over appointed counsels’ wages, this leaves room for manipulation; for example, investigators may be tempted to reward a fellow counsel by overstating the number of working days.

Third, “pocket” practices become possible due to poor organisation of the free legal aid system. Legally, law enforcers should not participate in distribution of cases between appointed defence attorneys; this is a privilege of the advocates’ community. Each regional bar decides how to organise the provision of free legal counsel for defendants at its own discretion. However, the official *case distribution system* lacks control mechanisms. Thus, investigators and judges can bypass it undisturbed to either invite their fellow defence attorneys by a direct phone call or exclude non-cooperative defence attorneys by creating a so-called black list. These decisions are taken informally and have no legal basis behind.

Fourth, for defence attorneys, the interest in “pocket” practices also derives from *insufficient state funding* to the legal aid system (a general problem for many countries). Because of their low wages, appointed defence attorneys are incentivised to make money by increasing caseload and disposing cases as speedily as possible. By doing so, they adapt to the bureaucratic logic of law enforcers and adopt their practices. According to Bright (1994), in the United States, the quality of representation is the lowest in capital cases, where people’s life is at stake. Due to inadequate funding for the indigent defence system, lack of supervision, deficit of investigative and expert assistance, American public defenders do not provide even the required minimal standards of legal representation to those who need it the most. “Slaughterhouse justice” is a rough but true description of such litigation model (Bright, 1994) that is also present in Russia. In such conditions, the state legal aid system features less competent lawyers, some of whom learn how to benefit from it.

Fifth, there are no efficient deterrence devices and *sanctions* for “pocket” behaviour. Advocates’ professional community reports that it regularly punishes those members who collaborate with investigators and revokes their licences, but the bars do not have sufficient political capital to push their agenda at the national level. As for investigators and judges, their sponsoring organisations
are concerned only with the number of acquittals and dismissals. Bypassing the official case distribution system is not perceived as unethical, and law enforcers do not get punished for inviting their fellow defence attorneys.

Thus, the problem of “pocket” defence attorneys is a reflection of different problems inside the Russian criminal justice system. Widely discussed and criticised, this issue has remained unsolved for years due to lack of strong political will to address it.

**Negotiations, adversariality, and inequality**

Plea bargaining has been criticised by scientists and laymen for a long time – both for being not adversarial and for producing social inequality. As to the former criticism, plea bargaining was gradually being reconsidered as a natural extension of the adversarial system. Negotiations are viewed as instrumental and tactical devices, which facilitate daily interaction of lawyers and bring benefits for each participant (Lichtenstein, 1984). As Uphoff postulates, “The lawyer committed to providing quality representation, therefore, must learn to be an effective negotiator” (Uphoff, 1995, p. 134–135). In contemporary American criminal process, where 90% of cases contain plea guilty, negotiating becomes an art of representation. In Russian courts, the rates of people who plead guilty are comparable (Volkov & Titaev, 2013). Some scientists (like Roberts, 2013) even claim that the accused should have a constitutional right to effective plea counsel. “Plea bargaining is no sport, (…) it is a serious event that – depending on whether and how it is conducted – can result in a lifelong mark of a criminal record and loss of liberty or even life” (Roberts, 2013, p. 2674). The current paper is consistent with such point of view: negotiations are by nature competitive, and ability to negotiate is the most vital professional skill for lawyers.

As for the latter criticism, it is argued that extensive use of plea bargaining makes the outcome of the case dependent not so much on the factual information, but rather on the negotiation skills of a representative. Such situation produces social inequality: wealthier people are likely to get more qualified legal assistance. Scant assistance of appointed counsels and zealous assistance of private counsels are two worlds apart with different populations of defendants and quality standards (Luban, 1993). Appointed defenders represent the lower social class, investigation virtually does not exist, and the time spent for every case is measured in minutes, rather than hours. The opposite could be said about private defenders. But this does not necessarily mean that a defendant represented by appointed defence attorneys get more severe penalties. Statistical data show that the influence of the type of counsel (appointed or hired) on the outcome is contextual: in certain situations, attorneys who regularly work by appointment are able to get more favourable outcomes for their clients (Anderson & Heaton, 2012; Hartley, Miller, & Spohn, 2010).

Today, plea bargaining is more widely accepted by legal scholarship than it was a few decades ago. After years of slashing criticism, it is gradually viewed as an integral part of criminal process. Vanishing trials and growth of consensual forms of dispute solution led scholars to think of adversarial criminal process as a historical phenomenon that is slowly dying, which is not necessarily bad (Menkel-Meadow, 2004). Plea bargaining follows such common trend of historical development of the legal system. Yet, some changes in negotiation process should be made. Social scientists are concerned with the informal character of plea bargaining: lawyers negotiate behind closed doors, which makes it impossible to ascertain whether a defence attorney is representing his/her client’s best interest. Possible improvements suggested thus far are to create a more transparent and less informal procedure of negotiations (i.e., legalisation of plea bargaining) (Bibas, 2011), and to involve the defendants into the negotiation process (Kitai-Sangero, 2015).

I endorse the idea that negotiations per se do not compromise adversariality and that legalisation of plea bargaining does not necessarily benefit the defendants. On the contrary, I argue that reduction of bargaining opportunities for defence attorneys might lessen chances for the accused to get a better judgment. Russia’s “special procedure court hearings” is a good example. Special procedure is a form of written contract between the prosecution and the defendant, according to
which the latter gets a milder sentence in exchange for admission of guilt and simplified procedure of court hearing. (A similar fast track exists in Italy, Germany, Spain, and other counties.) Several arguments lied behind the adoption of special procedure in Russia: (1) since many criminal cases already contain a negotiated admission of guilt, the question was not about creating a new institution but rather legalising an existing practice; (2) written agreements make the terms of plea bargaining more evident to the defendants and, thus, protect their rights; (3) applying special procedure to “simple” cases significantly reduces caseloads of judges and investigators (for more details and further discussions, see Fomin, 2011; Lazareva, 1999; Nazarov, 2015; Velikiy, 2005). In reality, special procedure did not lead to better rights protection of the accused but narrowed the margin of action for the defence attorneys. In context of accusatory bias, special procedure became a widely accepted tool for Russian investigators and judges, and a useful instrument supporting their demand for loyal counterparty. As Solomon notices, it became rather the return to Soviet style inquisitorialism – “a paradoxical result of a measure embedded in a Code meant to promote adversarialism” (Solomon, 2015, p. 168).

Before criticising plea bargaining for producing inequality and proposing solutions for its regulation – which are certainly needed – one should separate the wheat from the chaff and focus on the roots of the problem. Much confusion derives from the loose of understanding of what plea bargaining essentially is. Plea bargaining studies are often marred with unnecessary politicised and moralising views; “bargained” dispositions are frequently perceived as an undesirable element of criminal justice. In fact, most negotiations are simple discussions on the merits of the case and the order of proceedings, which allow both parties to avoid the worst-case scenario (Lynch, 2003).

The idea of “plea bargaining” is quite undefined. In particular, there is a huge difference between “plea bargaining” as a process of oral negotiations and “plea bargaining” as a written contract. These are phenomena of different sorts, which we define with the same term. Lawyers negotiate all the time – not only for getting an admission of guilt but also for reducing charges, releasing the defendant on bail, attaching evidence to the case, choosing the type of procedure, selecting the date of the next court hearing, visiting the defendant at the pretrial detention centre, creating the criminal self of the defendant, etc. Trying to make all negotiations transparent is utopian: formalising on paper the terms of an achieved agreement does not reduce negotiations per se and does not make the process of negotiating completely transparent. So, the wrong problems are being solved by inadequate means.

As for the Russian case, the real threat to equality and adversariality comes from institutional incentives of law enforcers and organisation of legal aid system for indigent people. If one compares the outcomes of plea-bargaining cases for appointed and private counsels, s/he might come to conclusion that there is no much difference. But it is impossible to estimate the number of cases when defendants were forced to plea guilty. Insufficient remuneration of appointed defence attorneys brings less qualified and less skilled advocates into the appointment system. Poorly paid and insufficiently supervised, Russian-appointed defence attorneys generally feel less responsible towards clients. Judges and investigators, in turn, see defence attorneys as obstacles; the institutional pressure they experience forces them to look for loyal counterparties. This leads to appointed counsels’ malpractices and opens the door for the problem of “pocket” defence attorneys who serve the interests of the state officials. “Pocket” counsels fail to perform the role of effective negotiator by inducing defendants to plead guilty to their disadvantage. This dysfunction of Russian criminal process ought to be solved with changes in the institutions of criminal justice.

**Conclusion**

In this paper, I analysed the role of defence attorneys as negotiators in Russia’s criminal justice system. This topic has not been thoroughly investigated before. Usually, legal scholars who are interested in Russia look at plea bargaining focusing on “special procedure court hearing” and leaving the core of the negotiation process aside. At the same time, the case of Russian advokatura
is a good illustration of the importance of negotiations in criminal process in general. It shows to which extent defence attorneys can be effective negotiators without sliding into non-professional collusive practices, especially as they work in a very challenging environment of accusatory bias and mighty state prosecution.

In the beginning of this article, I mentioned two different approaches to negotiations. From the structural perspective, negotiations are viewed as an organisational problem that could be solved by patching the holes in social and institutional settings. The social approach shows that negotiating is not necessarily a problem but, on the contrary, it is essential to the professional work of lawyers. While negotiating, lawyers pursue the external goals of doing justice and constructing a viable criminal case, and the internal goals of reducing uncertainty and saving time. Familiarity between members often eases negotiations, since it can greatly improve mutual trust. The more lawyers interact with each other, the more they become acquainted, and the less time they need to realise when, how, and for what they can reach an agreement. By itself, familiarity does not imply asymmetry. Such problem arises instead from both institutional weakness and financially dependency of Russian defence attorneys.

Russian defence attorneys are institutionally weak due to the professional situation they work in, which derives from the Soviet inquisitional system. Institutional incentives of judges and investigators create demand for cooperative defence, while procedural rules and practices of its implementation limit the opportunities for defence attorneys to make their own investigation, attach evidence to the case, and present arguments in court. In addition to these disadvantages, Russian advocates’ community is not unified and lacks control over its members. Russia’s problem is not unique. For example, Caldwell (2012) highlights the issue of “coercive plea bargaining,” a practice widely used by US prosecutors, who abuse their bargaining position to overcharge the defendant. Despite positional weakness, defence counsels in both countries have margins for negotiating on equal terms, for they have very important bargaining resources – access to the accused, admission of guilt, factual errors found in the prosecutor’s case, time control, etc.

Things get complicated when Russian law enforcers obtain devices for driving supply in order to satisfy demand for loyal counterparty. The most important of such tools is control of investigators and judges over the remuneration of appointed defence attorneys. Moved by economic interests, some appointed defence attorneys engage in the practices of “pocket” counsels: they become subordinated to state officials and leave the interests of clients unprotected and unrepresented. Thus, prosecution gets the possibility to hire the adversary; such an asymmetry violates the basic principle of fair justice.

Unlike negotiations, which are essentially a social phenomenon, the problem of “pocket” counsels can be solved by structural means. All individuals are different in regard to adherence to social and professional norms. The problem of non-compliance is present in any social context, but some formal and informal institutions make non-compliance more advantageous. Possible solutions to the existing problem in Russia are (a) exclusion of investigators and judges from the system of payment of appointed defence attorneys, (b) wage increase for appointed defence attorneys, (c) spreading computerised system of case distribution to all regions, (d) elaboration of ethics enforcement mechanisms for appointed defence attorneys (including ex-post evaluation), (e) introducing sanction for law enforcers who bypass official distribution system, (f) reconfiguration of the special procedure in order to open more room for negotiations. These measures would have better and faster effect if accompanied by changes of the incentives of law enforcers and strengthening of professional freedom of advocates.

The current paper is a short introduction to the major problems of criminal defence in Russia. More thorough investigation on the factors of collusive relations between law enforcers and defence attorneys, and on the concrete role that defence attorneys play in criminal process (both appointed and hired) offers promising avenues for further research. Moreover, my empirical data are limited to a few big Russian cities; there is no information on the work of defence attorneys in small cities and in the countryside, where the professional environment is quite
different and the process of workgroup formation is smoother. Studying rural criminal justice will significantly enlarge our understanding of the rule of law in Russia in general and of the Russian legal profession in particular.

Notes

1. The Institute for the Rule of Law (IRL) is part of the European University at St. Petersburg, Russia. The author takes the position of researcher in the IRL from August 2012. The primary projects of the IRL are focused on criminal justice system, law enforcement agencies, and judicial authorities in Russia.
2. The author thanks her colleagues Ekaterina Khodzhaeva and Julia Rabovski who were participating in the project from the very beginning and conducted a large part of interviews.
3. A percentage of 0.2 criminal cases end up with acquittals in court (see Table 28; Volkov et al., 2014).
4. Most trials in Russia are public; this is why to get into the courts was not a formidable obstacle. Nonetheless, since seldom people attend court hearings and most cases are handled with no audience, some judges were anxious about my presence. For example, they could ask for my ID and my status. In this case, I presented myself as a researcher who observed the work of defence attorneys. Usually, that was enough to be allowed to attend a hearing. I presume that in the majority of cases, when I was not asked about my status, the judge and other court members thought I was a law student.
5. The two databases of interviews have been analysed with the support of NVivo software. In the first data set of interviews with advocates, the following topics were in focus: relations with state lawyers, control over clients, work routine, tactics of defence, career trajectory, specialisation, professional values, etc. The second data set of interviews with judges and law enforcers has been used selectively; my interest had been limited to their relations with advocates and attitude towards the state system of free legal aid.
6. As in most of Europe, legal profession in Russia is segmented, meaning that judges, law enforcers, and counsels do not have a unified professional association (like the American Bar Association) and a unified code of ethics for all lawyers.
8. To be licenced, one needs to get a degree in law, have a 2-year internship, and pass the exam in a local bar.
9. These two types of contracts differ in many respects. In the case of appointed defence attorney, a contract is concluded between the state and a lawyer; it applies only to criminal cases; the wages are determined by the state; the nature of a contract is compulsory (a defendant cannot choose an appointed defence attorney nor can a defence attorney choose a client); a contract is discontinuous, meaning that there is usually one defence attorney during investigation process and another one in court. As for hired counsels, contracts are concluded between a defence attorney and a client; they apply both to criminal and civil cases; their rates are negotiable; they are based on mutual agreement; a client can choose to sign a contract for one action, for one stage, or for a whole case. Appointed defence attorneys usually work with lower social classes, while private defence attorneys are hired by middle and upper social classes.
10. The likelihood to work as an appointed defence attorney on a regular basis is higher for those who are in the beginning or the end of their careers. Young advocates use the state system of legal aid as a chance to get experience, learn informal rules of interaction in police offices and courts, and train their professional skills. For aged defenders, appointment is often the only available option. Also, appointed counsels are more numerous in the countryside, and hired counsels in the cities.
11. Three types of law enforcers are involved in preparing criminal cases: (1) policemen, who register crimes and arrest suspects; (2) investigators, who do detective and paper work, i.e., look for evidence, interview witnesses, and prepare documents; (3) prosecutors, who control the work of policemen and investigators, append their signature on the case file before it goes to a court, and present the case in court hearings (public prosecution).
13. Article 221 of the Russian Criminal Procedural Code (prosecutor’s discretion); Article 237 of the Russian Criminal Procedural Code (judge’s discretion).
14. Dismissals at the pretrial stage also have negative consequences for investigators but to a lesser extent.
17. Most of the cases in special procedure that the author observed in district courts were resolved within an hour, while normally criminal cases are tried for few months.
18. Special procedure has been thoroughly investigated by the IRL. One of the most outstanding findings is that special procedure does not lead to a milder sentence: judges in general do not sentence defendants beyond two-
thirds of the maximum, regardless of whether the case is reviewed in normal procedure or special procedure (Titaev & Pozdnyakov, 2012). As Solomon (2012) commented it, “In Russia, like in the United States, once a majority of accused persons plead guilty, then their fate becomes the statistical norm” (p. 297).

19. Almost 40% of Russian advocates have previous working experience in law enforcement agencies (see Graph 3.1; Kazun, Khodzhaeva, & Yakovlev, 2015).

20. KGB, with the help of local bars, enlisted those advocates who were allowed to work on such cases. In Moscow, only 10% of advocates have passed test on political loyalty and were included in the list (Kaminskaya, 1982).


22. Article 162 (2) of the Russian Criminal Code.


25. From 5 to 40 US dollars for each action depending on the circumstances (complexity of the case, time of day, number of accused people, etc.).

26. Hereinafter, the number of the interview in the NVivo database.

27. This is the most important platform for discussing legal issues in Russia. The 3rd International Legal Forum was held in St. Petersburg on 27–30 May 2015.

28. Of course, individual factor cannot be completely excluded. People are susceptible to external influences to different extents. The likelihood of taking the “pocket” role by defence attorneys will depend on their social capital, stage of career, previous experience, personal beliefs and preferences, etc.

29. It is called suoden’ – literally “days of trials,” the number of days in which the advocate worked on one case, both at the pretrial and trial stages. Regardless the time that the appointed defence attorney spent for one case during the day, s/he gets fixed fee. At the same time, the advocate can serve several cases per day and get more money. For example, s/he can attend 10 investigative actions for 10 different crimes or 10 investigative actions for 1 crime – in the first case, the wages will be 10 times higher.

30. There are different ways to distribute cases among appointed defence attorneys: (a) through special divisions created inside the regional bars, where coordinators receive the requests from investigators and judges by phone and assign those advocates who are on duty at the moment (like in St. Petersburg); (b) through independent call centres, where employed operators take the requests from investigators and judges by phone and dispatch advocates automatically selected by computer (like in Samara); (c) through advocate firms who take themselves the requests from investigators and judges by phone and assign their members who have smaller caseloads at the moment or who usually work by appointment (like in Moscow).

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